

**Matter of Slavin**

2016 NY Slip Op 30151(U)

January 27, 2016

Surrogate's Court, New York County

Docket Number: 2015-1970

Judge: Rita M. Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: JANUARY 27, 2016

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Petition to Compel Production of Will of

RAUL M. SLAVIN,  
  
Deceased,

AMENDED DECISION  
File No.: 2015-1970

Pursuant to SCPA 1401.  
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M E L L A, S.:

The following papers were considered in deciding respondent's motion to dismiss the petition to compel production of a will:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation in Support, and Exhibits A–H.....	1, 2
Petitioner's Memorandum of Law in Support of the Petition to Compel Production of Will and in Opposition to the Motion to Dismiss, and Exhibits A–E.....	3
Reply Affirmation in Further Support of Motion to Dismiss Petition, with Exhibits 1–3.....	4

On the court's own motion, the decision in this matter issued on January 8, 2016, is retracted and replaced with the following.

Upon review of a petition to compel production of a will in the estate of Raul Slavin, the court issued an Order, dated July 10, 2015, directing decedent's spouse to appear in court and to "submit to examination respecting . . . paper writings purporting to be the last wills and testaments" of decedent. The Order further directed respondent to produce in court "the original of said paper writings." Before the court at the call of the calendar on December 8, 2015, were a motion to dismiss the petition as well as the petition itself, which had been filed by one of decedent's sons.

After hearing oral arguments, the court denied respondent's motion to dismiss. The

motion was based on the assertion that jurisdiction over respondent had not been obtained (CPLR 3211[a][8]), because she was not timely served with the petition in the SCPA 1401 proceeding.

For several reasons, the court disagreed. First, sections 301 and 306 of the SCPA, on which respondent relied, are not applicable to a SCPA 1401 proceeding, which is commenced by order and not citation.<sup>1</sup> Second, contrary to respondent's argument, neither SCPA 1401 nor any of the inapplicable provisions on which respondent relied requires service of the petition upon which the order (or other process) issued (1-6 Warren's Heaton § 6.02[1][2]; *see also* SCPA 103[43]).<sup>2</sup> Respondent's reliance on provisions of Article Three of the CPLR is misplaced where, as here, the SCPA provides the specific process to be used (SCPA 102).

Third, the court found unpersuasive respondent's argument that "fundamental" due process principles require service of the petition along with the court's order directing respondent to appear in court. When a State statute provides, as SCPA 1401 does, "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the

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<sup>1</sup>SCPA 1401 provides, in pertinent part, that

Whenever it shall appear to the court, sua sponte, or by [a] petition . . . that there is reasonable ground to believe that any person has knowledge of the whereabouts or destruction of a will of a decedent the court may make an order requiring the person or persons named therein to attend and be examined in the premises. Service of the order must be made by delivery of a certified copy thereof to the person or persons named therein either personally or in such manner as the court shall direct. The court may either in the order or otherwise in the proceeding require the production and filing in court of any will of the decedent which it finds is in the possession or under the control of the respondent.

<sup>2</sup>Respondent was served with a copy of the petition, following the court's direction on October 9, 2015, the initial return date on the petition, that petitioner effect such service (*see* SCPA 302[3]).

[proceeding] and afford[s] them an opportunity to present their objections,” due process is satisfied (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]). In an SCPA 1401 proceeding, the process required is clear: service upon respondent of a certified copy of the order issued by the court, personally or in the manner as the court shall direct. By requiring personal delivery on respondent of a certified copy of the Order, the court ensured that respondent was afforded notice designed to apprise her that the court required her presence for an examination on a date certain. Respondent, who does not dispute having been served with the Order issued by this court to commence this proceeding,<sup>3</sup> was further afforded an opportunity to be heard on that date.

The balance of the motion, seeking costs and sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1, was also denied on the record on December 8, 2015.

Turning to the merits of this petition to compel production of a will of decedent (*see Matter of Yung*, 216 App Div 595 [3d Dept 1926]), the court granted the petition and ordered respondent to produce in this court, as she had been directed to do by the July 10, 2015 Order, all original paper writings purporting to be testamentary instruments of the decedent in her possession or within her control, no later than December 15, 2015. The court found respondent’s assertion that SCPA 1401 “implicitly acknowledges an exception to its general application when ‘good cause’ exists for not filing a will” unavailing. Respondent does not dispute that petitioner is a person authorized by the statute to bring the present petition (*see* SCPA 1401, 1402[1][b]). Under the circumstances presented, there was reasonable ground to believe that respondent had

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<sup>3</sup>The Order was not personally delivered to respondent as directed by the court but respondent concedes that she requested that service of the Order be effected on her counsel.

knowledge and was in possession or control of a testamentary instrument of decedent, and thus the court was justified in issuing an order directing respondent to appear in court and produce such instrument. Therefore, the statutory requirements were satisfied (*Matter of Yung*, 216 App Div at 597; *Matter of Lupton*, 26 Misc 2d 827 [Sur Ct, Suffolk County 1960]). A proceeding to compel the production of a will is independent and has no relation to any other proceeding and determines no right (*Matter of Hardy*, 216 NY 132 [1915]; *Matter of Johnson*, 253 App Div 698, 700 [2d Dept 1938]). The purpose of the proceeding is to afford an opportunity to an interested party to inquire about the existence of testamentary instruments and to direct the production of such instruments (2-32 Warren's Heaton § 32.04[2]; *Matter of Lupton*, 26 Misc 2d 827; *see also Matter of Babakhanian*, 21 Misc 3d 1106[A] [Sur Ct, Nassau County 2008]).<sup>4</sup>

The balance of the relief sought by petitioner, including legal fees and costs, was denied by the court.

This decision together with the transcript of the December 8, 2015 proceedings constitute the order of the court.

Dated: January 27, 2016

  
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<sup>4</sup>Having found compliance with statutory requirements, the court need not reach respondent's argument that the application was brought in bad faith. In any event, that petitioner may intend to exercise his right to object to admission of the instrument to probate, should respondent seek such relief, hardly constitutes bad faith. Additionally, petitioner articulated a good faith reason for requesting that decedent's will be filed with the court: petitioner's ability to petition for letters of administration in order to investigate the existence of and marshal assets of the decedent would be curtailed if he is unable to allege that decedent died intestate, or that there is no pending proceeding to probate a testamentary instrument filed with the court (SCPA 1001[9]). Also curtailed would be petitioner's ability to become the administrator of the estates of his two predeceased brothers, of which decedent, but not respondent, was a distributee.